No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

KANSAS' REPLY IN SUPPORT OF MOTION TO STRIKE AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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The State of Kansas respectfully submits this reply in support of (A) its motion to strike the counterclaims filed by the State of Nebraska without leave of this Court and (B) its motion for appointment of a special master.

ARGUMENT

A. Nebraska's Counterclaims Should Be Stricken Because They Were Filed Without Leave of Court.

Kansas' motion to strike Nebraska's counterclaims raises the question whether a defendant state in an original action may file counterclaims without obtaining this Court's determination that the proposed counterclaims are of a seriousness and dignity befitting this Court's original jurisdiction. Nebraska rests its argument that such a determination was unnecessary on Supreme Court Rule 17.2, which states that the Federal Rules of Civil Procedure govern the "form of pleadings" in this Court, and Rule 13(a) of the Federal Rules of Civil Procedure, which defines the conditions under which a pleading shall state a claim as a counterclaim. State of Nebraska's Brief in Opposition to Kansas' Motion to Strike Nebraska's Counterclaim and Motion for Appointment of Special Master ("Nebraska's Brief") at 2.

Nebraska's reliance on these rules of procedure is unavailing. Initially, this Court's exercise of its original jurisdiction is no mere matter of "form of pleadings." A mechanical application of rules of civil procedure is a

poor surrogate for the discretionary and factbound determination that this Court undertakes in its gatekeeping role. See *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992).

At any rate, Rule 13(a) of the Federal Rules of Civil Procedure does not answer the question at hand, which is not whether Nebraska's counterclaims are compulsory or permissive, but rather, whether Nebraska was required to obtain leave of this Court in order to file them. Nebraska argues that, "by definition," this Court's decision to grant leave to Kansas to file a bill of complaint warrants exercise of this Court's original jurisdiction over "any counterclaim arising from the same transaction and/or occurrence." Nebraska's Brief at 3-4. Thus, under Nebraska's formulation, this Court, in granting leave to file a bill of complaint, implicitly authorized any and every counterclaim arising from "the administration and enforcement of the Republican River Compact." *Id.*, at 2.

In Kansas' view, that conclusion does not automatically follow. Rather, as Kansas explained in its opening brief, this Court considers whether to exercise its original jurisdiction over specific "claims." Kansas' Brief in Support of Motion to Strike at 3. In view of this Court's exercise of its original jurisdiction only sparingly and after a careful, particularized inquiry, there is nothing to commend the *carte blanche* authorization of any and all future counterclaims as are deemed "compulsory," which Nebraska asks this Court to infer from the Court's decision to hear Kansas' claim. See *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (emphasizing that "proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings").

Nebraska would distinguish the decision in *Nebraska v. Wyoming* on the ground that "[t]his Court considered Wyoming and Nebraska's requests solely by reference to [Rule 15(a) of the Federal Rules of Civil Procedure]." Nebraska's Brief at 4. Nebraska's assertion is in error, as the first sentence in the legal discussion in *Nebraska v. Wyoming* makes clear: "We have found that the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, 15(a), does not suit cases within this Court's original jurisdiction." 515 U.S., at 8 (citation omitted). If the liberal pleading standard of Rule 15(a) did not obviate the requirement of this Court's leave to file new claims in *Nebraska v. Wyoming*, it is unclear how the pleading standard of Rule 13(a) would do so here.

While "[i]t is not clear" to Nebraska why Wyoming sought leave from this Court before filing its counterclaim in *Nebraska v. Wyoming*, 481 U.S. 1011 (1987), Nebraska's Brief at 3, the simple answer may be that Wyoming understood the importance of this Court's role in determining which claims are properly within its original jurisdiction. The fact that, on the other hand, defendant states have filed counterclaims without leave of this Court, see *ibid.*, is not an endorsement of the practice as procedurally proper. Moreover, the decision in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), emphasizing the Court's care in allowing enlargement of existing original jurisdiction cases, has been handed down since the examples cited by Nebraska.

In view of the foregoing, Nebraska should not be allowed to file additional claims absent approval by the Court of a motion for leave to do so.

B. A Special Master Should Be Appointed.

Kansas has moved for appointment of a special master on the ground that the pleadings now on file demonstrate that there are factual disputes between the parties that a special master can expeditiously assist this Court in resolving.

Nebraska counters that a special master should not be appointed because "[t]he pleadings have not been closed." Nebraska's Brief at 5. This observation, while correct, is beside the point. That Kansas has not yet filed a reply to Nebraska's unauthorized counterclaims does not negate the existence of factual disputes or the convenience that a special master would bring to the process of resolving them.

Nebraska asserts that it has dispositive defenses, namely (1) an asserted failure to join the United States as an indispensable party and (2) the asserted inapplicability of the Republican River Compact to groundwater pumping based largely on the absence of an explicit use of the term "groundwater" in the Compact; and Nebraska argues that these defenses should be heard and decided before a special master is appointed. *Id.*, at 5-8. While it is premature to evaluate defenses that have not yet even been raised by motion, Kansas does not believe that these defenses are substantial. See, *e.g.*, *Oklahoma v. New Mexico*, 501 U.S. 221 (1991) (interstate compact enforced despite nonjoinder of United States); *Kansas v. Colorado*, 514 U.S. 673 (1995) (compact enforced against defendant state's pumping of groundwater although compact did not mention "groundwater").

At any rate, Nebraska has not demonstrated that the appointment of a special master would *hinder* the resolution of this case, whether on the basis of either of these

promised defenses or on factual grounds. A special master can certainly recommend a decision of legal as well as factual issues, and there is no apparent reason that such a process cannot go forward as soon as a special master is appointed.

In sum, a special master should be appointed because such an appointment will likely advance the resolution of this action.

CONCLUSION

Kansas' Motion to Strike Nebraska's Counterclaims and Kansas' Motion for Appointment of Special Master should be granted.

Respectfully submitted,

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